

# Waters of the US and its Longstanding Regulatory Definition (dates to mid-1980s)

- This is the **definition in use today** during ongoing litigation over the Clean Water Rule
- **Definition includes:**
  - Waters used/historically used/susceptible to use in interstate commerce
  - Interstate waters and wetlands
  - All other waters ... the use, degradation, or destruction of which could affect interstate commerce
  - Impoundments of WOTUS
  - Tributaries of above waters
  - Territorial seas
  - Wetlands adjacent to above waters
  - Excludes: prior converted cropland, waste treatment systems

# *Questions and Discussion*





# Appendix

## Additional Details on the CWR



Subject	Old Rule	Proposed Rule	Final Rule
<b>Navigable Waters</b>	Jurisdictional	Same	Same
<b>Interstate Waters</b>	Jurisdictional	Same	Same
<b>Territorial Seas</b>	Jurisdictional	Same	Same
<b>Impoundments</b>	Jurisdictional	Same	Same
<b>Tributaries to the Traditionally Navigable Waters</b>	Jurisdictional; did not define tributary	Defined tributary for the first time as water features with bed, banks and ordinary high water mark, and flow downstream.	Same as proposal except wetlands and open waters without beds, banks and high water marks will be evaluated for adjacency.
<b>Adjacent Wetlands/Waters</b>	Jurisdiction included wetlands adjacent to traditional navigable waters, interstate waters, the territorial seas, impoundments or tributaries.	Included all waters adjacent to jurisdictional waters, including waters in riparian area or floodplain, or with surface or shallow subsurface connection to jurisdictional waters.	Includes waters adjacent to jurisdictional waters within a minimum of 100 feet and within the 100-year floodplain to a maximum of 1,500 feet of the ordinary high water mark.
<b>Isolated or “Other” Waters</b>	Jurisdiction included all other waters the use, degradation or destruction of which could affect interstate or foreign commerce.	Included “other waters” where there was a significant nexus to traditionally navigable water, interstate water or territorial sea.	Includes specific waters that are similarly situated: Prairie potholes, Carolina & Delmarva bays, pocosins, western vernal pools in California, & Texas coastal prairie wetlands when they have a significant nexus. Includes waters with a significant nexus within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas, as well as waters with a significant nexus within 4,000 feet of jurisdictional waters.
<b>Exclusions to the definition of “Waters of the U.S.”</b>	Excluded waste treatment systems and prior converted cropland.	Categorically excluded those in old rule and added two types of ditches, groundwater, gullies, rills and non-wetland swales.	Includes proposed rule exclusions, expands exclusion for ditches, and also excludes constructed components for MS4s and water delivery/reuse and erosional features.

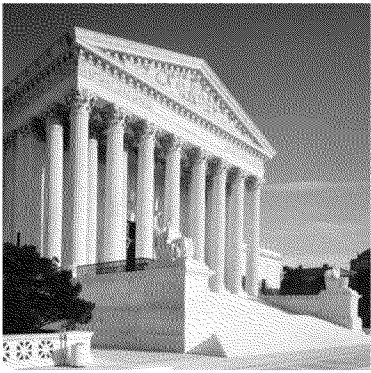


# “Waters of the US” and Clean Water Act Programs



- CWA establishes many programs to protect quality of WOTUS:
  - Section 303(c): state-developed water quality standards setting waters' quality goals
  - Section 303(d): “Total Maximum Daily Load” (TMDL) plans to bring waters into compliance with water quality standards
  - Section 311: oil spill prevention and clean-up
  - Section 401: state/tribal certification that federal permits and licenses are consistent with CWA and local requirements
  - Section 402: “NPDES” permit program for “end of pipe” discharges of pollutants from sources including factories, sewage treatment plants, and other point sources
  - Section 404: permit program for discharges of dredged/fill material





# Waters of the US at the U.S. Supreme Court

- ***Riverside Bayview*** (1985): Wetlands adjacent to TNWs are properly part of WOTUS
- ***SWANCC*** (2001): Presence of migratory birds by itself not enough to make “other waters” WOTUS
- ***Rapanos*** (2006): Tributaries, adjacent wetlands. Split decision on what WOTUS includes
  - Scalia: “Relatively permanent” or at least seasonal waters; wetlands with a “continuous surface connection”
  - Kennedy: Waters with a “significant nexus” affecting physical, chemical, or biological integrity of downstream waters
  - All: WOTUS includes more than just waters that are navigable



# Waters of the US and Legal Challenges Posed By *Rapanos*

- *Rapanos* has now been interpreted, applied, discussed, or cited in > 130 federal judicial opinions
  - These cases arise in more than 2/3 of all U.S. states
  - U.S. position: water is jurisdictional if meets either the Kennedy or Scalia standards
- All but one U.S. Circuit Courts of Appeal have agreed with U.S. regarding what standard applies
  - Most hold either Kennedy or Scalia standard can be used
  - One held Kennedy standard only
  - None say Scalia standard only
- Supreme Court has rejected all petitions for review





**To:** Wehling, Carrie[Wehling.Carrie@epa.gov]; Wendelowski, Karyn[wendelowski.karyn@epa.gov]  
**From:** Kwok, Rose  
**Sent:** Tue 3/14/2017 2:52:10 PM  
**Subject:** Fw: USACE Comments on CWA Rulemaking Options Paper  
Corps Technical Comments Table for Options 2017 13 March 2017.docx  
USACE Counsel Comments on EPA WOTUS Options Paper 13 MAR 2017.docx

# Deliberative Process / Ex. 5

Rose Kwok

U.S. Environmental Protection Agency

Wetlands Division

[kwok.rose@epa.gov](mailto:kwok.rose@epa.gov)

202-566-0657, 202-566-1375 (fax)

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**From:** Downing, Donna  
**Sent:** Monday, March 13, 2017 4:56 PM  
**To:** Kupchan, Simma; Kwok, Rose; Christensen, Damaris  
**Subject:** FW: USACE Comments on CWA Rulemaking Options Paper

-----Original Message-----

From: Moyer, Jennifer A CIV USARMY CEHQ (US) [<mailto:Jennifer.A.Moyer@usace.army.mil>]  
Sent: Monday, March 13, 2017 4:54 PM  
To: Downing, Donna <[Downing.Donna@epa.gov](mailto:Downing.Donna@epa.gov)>  
Cc: Campbell, Ann <[Campbell.Ann@epa.gov](mailto:Campbell.Ann@epa.gov)>; Goodin, John <[Goodin.John@epa.gov](mailto:Goodin.John@epa.gov)>;  
David.F.Dale@usace.army.mil; Cooper, David R SES USARMY CEHQ (US)  
<[David.R.Cooper@usace.army.mil](mailto:David.R.Cooper@usace.army.mil)>; Jensen, Stacey M CIV USARMY HQDA (US)  
<[Stacey.M.Jensen@usace.army.mil](mailto:Stacey.M.Jensen@usace.army.mil)>; Eisenberg, Mindy <[Eisenberg.Mindy@epa.gov](mailto:Eisenberg.Mindy@epa.gov)>  
Subject: USACE Comments on CWA Rulemaking Options Paper

# Deliberative Process / Ex. 5

Jennifer

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Jennifer Moyer  
Chief, Regulatory Program  
Headquarters, U.S. Army Corps of Engineers  
441 G Street, NW  
Washington, DC 20314  
202-761-4598 (office)  
703-589-5746 (mobile)



**To:** Wehling, Carrie[Wehling.Carrie@epa.gov]; Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]  
**From:** Neugeboren, Steven  
**Sent:** Fri 4/21/2017 7:24:05 PM  
**Subject:** correspondance on corps JD - fyi  
[17-000-7640.pdf](#)

FYI – controlled correspondence that ogc received as courtesy copy. Assume was controlled to ow.

Steven Neugeboren  
Associate General Counsel  
Water Law Office  
Environmental Protection Agency  
202-564-5488

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**From:** Veney, Carla  
**Sent:** Friday, April 21, 2017 11:48 AM  
**To:** Neugeboren, Steven <Neugeboren.Steven@epa.gov>  
**Cc:** Shaw, Carla <Shaw.Carla@epa.gov>  
**Subject:** Emailing - 17-000-7640.pdf

Steve, this was sent to OGC as an cc. Thanks.

**To:** Wehling, Carrie[Wehling.Carrie@epa.gov]  
**From:** Kwok, Rose  
**Sent:** Tue 4/11/2017 1:44:18 PM  
**Subject:** Re: Format of proposed rule text?  
Step 1 Rule Draft - 4-6-2017.docx

Just sent you a new link - hopefully that works...if not, I've attached the document

Rose Kwok  
  
U.S. Environmental Protection Agency  
  
Wetlands Division

kwok.rose@epa.gov  
  
202-566-0657, 202-566-1375 (fax)

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**From:** Wehling, Carrie  
**Sent:** Tuesday, April 11, 2017 9:01:44 AM  
**To:** Kwok, Rose  
**Subject:** RE: Format of proposed rule text?

Hey, Rose. Welcome back....  
The link does not work for me.....is there some other way I can try to get to the document?  
Thanks.

Caroline (Carrie) Wehling  
Assistant General Counsel  
Water Law Office  
U.S. Environmental Protection Agency  
Washington DC 20004  
202-564-5492  
wehling.carrie@epa.gov

-----Original Message-----  
From: Kwok, Rose  
Sent: Monday, April 10, 2017 5:47 PM  
To: Downing, Donna <Downing.Donna@epa.gov>; Kupchan, Simma <Kupchan.Simma@epa.gov>; Stacey Jensen <Stacey.M.Jensen@usace.army.mil>; Christensen, Damaris <Christensen.Damaris@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Wehling, Carrie <Wehling.Carrie@epa.gov>  
Subject: RE: Format of proposed rule text?

Hi All,  
  
I wasn't on the more recent emails last week with the reg text, so I wanted to confirm that this is the latest (I added a few comments):  

**Nonresponsive Internal URL/ Ex. 6**

In my comments, mainly, I found 

**Deliberative Process / attorney client Ex. 5**

...also, I found some text that was not in the "format combo" that it's supposed to be in to match (e.g. in bold instead of bold underline).

-----Original Message-----  
From: Downing, Donna  
Sent: Monday, April 10, 2017 1:57 PM  
To: Kwok, Rose <Kwok.Rose@epa.gov>  
Subject: FW: Format of proposed rule text?

Think this is the latest...  
  
DMD



-----Original Message-----

From: Jensen, Stacey M CIV USARMY HQDA (US) [mailto:Stacey.M.Jensen@usace.army.mil]  
Sent: Thursday, April 06, 2017 8:29 AM  
To: Kupchan, Simma <Kupchan.Simma@epa.gov>; Downing, Donna <Downing.Donna@epa.gov>; Christensen, Damaris <Christensen.Damaris@epa.gov>  
Cc: Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Wehling, Carrie <Wehling.Carrie@epa.gov>  
Subject: RE: Format of proposed rule text?

A few minor edits. Thank you, Simma!

-----Original Message-----

From: Kupchan, Simma [mailto:Kupchan.Simma@epa.gov]  
Sent: Wednesday, April 05, 2017 5:23 PM  
To: Downing, Donna <Downing.Donna@epa.gov>; Christensen, Damaris <Christensen.Damaris@epa.gov>; Jensen, Stacey M CIV USARMY HQDA (US) <Stacey.M.Jensen@usace.army.mil>  
Cc: Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Wehling, Carrie <Wehling.Carrie@epa.gov>  
Subject: [Non-DoD Source] RE: Format of proposed rule text?

Thanks to all for your input. Attached is a draft strikethrough rule text. I welcome your review.

Simma Kupchan

Water Law Office

US EPA Office of General Counsel

William Jefferson Clinton Building North Room 7426Q

(p) 202-564-3105

From: Downing, Donna  
Sent: Wednesday, April 05, 2017 3:15 PM  
To: Christensen, Damaris <Christensen.Damaris@epa.gov>; Kupchan, Simma <Kupchan.Simma@epa.gov>; Wehling, Carrie <Wehling.Carrie@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Stacey Jensen <Stacey.M.Jensen@usace.army.mil>  
Subject: RE: Format of proposed rule text?

I concur with the emerging consensus to just do **Deliberative Process / attorney client Ex. 5**

We also would need to say in a header or footnote that **Deliberative Process / attorney client Ex. 5**  
**Deliberative Process / attorney client Ex. 5**

From: Christensen, Damaris  
Sent: Wednesday, April 05, 2017 2:40 PM  
To: Kupchan, Simma <Kupchan.Simma@epa.gov <mailto:Kupchan.Simma@epa.gov> >; Wehling, Carrie <Wehling.Carrie@epa.gov <mailto:Wehling.Carrie@epa.gov> >; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov <mailto:Eisenberg.Mindy@epa.gov> >; Downing, Donna <Downing.Donna@epa.gov <mailto:Downing.Donna@epa.gov> >; Stacey Jensen <Stacey.M.Jensen@usace.army.mil <mailto:Stacey.M.Jensen@usace.army.mil> >  
Subject: RE: Format of proposed rule text?

I think the first approach is much easier. If the changes are small enough (I honestly can't remember from all the versions) maybe you could present **Deliberative Process / attorney client Ex. 5**

Might be useful to take, say, **Deliberative Process / Ex. 5** But just for one.

From: Kupchan, Simma  
Sent: Wednesday, April 05, 2017 2:36 PM  
To: Wehling, Carrie <Wehling.Carrie@epa.gov <mailto:Wehling.Carrie@epa.gov>>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov <mailto:Eisenberg.Mindy@epa.gov>>; Downing, Donna <Downing.Donna@epa.gov <mailto:Downing.Donna@epa.gov>>; Christensen, Damaris <Christensen.Damaris@epa.gov <mailto:Christensen.Damaris@epa.gov>>; Stacey Jensen <Stacey.M.Jensen@usace.army.mil <mailto:Stacey.M.Jensen@usace.army.mil>>  
Subject: Format of proposed rule text?

All,

In "drafting" the proposed rule text for next week's meeting, do we just want to see **Deliberative Process / attorney client Ex. 5**

Or do we want to present a version of **Deliberative Process / attorney client Ex. 5**  
I assume **Deliberative Process / attorney client Ex. 5** but I wanted to confirm.

I wanted to nail down today as I will be out of the office Friday - Wednesday.

Thanks,

Simma Kupchan  
Water Law Office  
US EPA Office of General Counsel  
William Jefferson Clinton Building North Room 7426Q  
(p) 202-564-3105



**To:** Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]  
**From:** Wehling, Carrie  
**Sent:** Fri 5/5/2017 7:42:28 PM  
**Subject:** RE: letter  
Earthjustice AX-17-000-6900.cw.docx

Just a few comments. Thanks.

Caroline (Carrie) Wehling  
Assistant General Counsel  
Water Law Office  
U.S. Environmental Protection Agency  
Washington DC 20004  
202-564-5492  
wehling.carrie@epa.gov

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**From:** Eisenberg, Mindy  
**Sent:** Friday, May 05, 2017 3:15 PM  
**To:** Wehling, Carrie <Wehling.Carrie@epa.gov>  
**Subject:** letter

Here is a draft response and the original incoming. I think

**Deliberative Process / Ex. 5**

**Deliberative Process / Ex. 5**

Thanks!

Mindy Eisenberg  
Acting Director, Wetlands Division  
Office of Wetlands, Oceans and Watersheds  
U.S. Environmental Protection Agency  
1200 Pennsylvania Ave., NW, mailcode 4502T  
Washington, DC 20460  
(202) 566-1290  
eisenberg.mindy@epa.gov

**To:** Christensen, Damaris[Christensen.Damaris@epa.gov]  
**From:** Wehling, Carrie  
**Sent:** Tue 4/11/2017 7:56:12 PM  
**Subject:** RE: Attorney Client / Ex. 5

Attorney Client / Ex. 5

Attorney Client / Ex. 5

Carrie

Caroline (Carrie) Wehling  
Assistant General Counsel  
Water Law Office  
U.S. Environmental Protection Agency  
Washington DC 20004  
202-564-5492  
wehling.carrie@epa.gov

**From:** Christensen, Damaris  
**Sent:** Tuesday, April 11, 2017 3:21 PM  
**To:** Wehling, Carrie <Wehling.Carrie@epa.gov>  
**Subject:** Attorney Client / Ex. 5

Attorney Client / Ex. 5

Thanks!

Appointment

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**From:** Kupchan, Simma [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=784E0AEA94A7485FA0435CC0CF5A62A5-SASHER]  
**Sent:** 5/30/2017 3:27:13 PM  
**To:** Thomas, Elizabeth [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=9e34a0e6f34345968aa130c4eb8438e2-ETHoma03]; Evalenko, Sandy [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=dd595e1baa9640a296313941e77ebdf0-SEvalenk]; Kwok, Rose [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=d3d2987ba8f246a5a9e37773201fd180-Kwok, Rose]  
**CC:** Owens, Nicole [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=30cf6e677ee74b2f998423e6e2836fdd-NOWens]; Wendelowski, Karyn [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=1d913e7d7397466a803149761a0bdf18-KWENDELO]; Eisenberg, Mindy [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=cfb4c26bb6f44c7db69f9884628b3ef9-Eisenberg, Mindy]; Nurse, Leanne [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=826243fb40f64a3ba99b0f98498ea4fe-Nurse, Leanne]; Nelson, Tomeka [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=31c257115c0c400dbb712c19b5ee82fb-TNelson02]  
**Subject:** Canceled: Fed Reg Prep for WOTUS  
**Attachments:** FRL-9962-34-OW Elizabeth Thomas.docx; 2014 40 CFR 122.docx  
**Location:** Call in: **Nonresponsive Conference Code/ Ex. 6**  
**Start:** 5/30/2017 6:30:00 PM  
**End:** 5/30/2017 7:00:00 PM  
**Show Time As:** Free  
**Importance:** High

**Personal Matters / Ex. 6** so deleting the room (as it would have been a trek for you anyway.)

Appointment

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**From:** Kupchan, Simma [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=784E0AEA94A7485FA0435CC0CF5A62A5-SASHER]  
**Sent:** 5/16/2017 9:04:08 PM  
**To:** Kupchan, Simma [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=784e0aea94a7485fa0435cc0cf5a62a5-SASHER]; Thomas, Elizabeth [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=9e34a0e6f34345968aa130c4eb8438e2-ETHoma03]; Evalenko, Sandy [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=dd595e1baa9640a296313941e77ebdf0-SEvalenk]; Kwok, Rose [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=d3d2987ba8f246a5a9e37773201fd180-Kwok, Rose]  
**CC:** Owens, Nicole [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=30cf6e677ee74b2f998423e6e2836fdd-NOWens]; Wendelowski, Karyn [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=1d913e7d7397466a803149761a0bdf18-KWENDELO]; Eisenberg, Mindy [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=cfb4c26bb6f44c7db69f9884628b3ef9-Eisenberg, Mindy]; Nurse, Leanne [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=826243fb40f64a3ba99b0f98498ea4fe-Nurse, Leanne]; Nelson, Tomeka [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=31c257115c0c400dbb712c19b5ee82fb-TNelson02]  
**Subject:** Canceled: Fed Reg Prep for WOTUS  
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**Location:** Call in **Nonresponsive Conference Code/ Ex. 6**  
**Start:** 5/30/2017 6:30:00 PM  
**End:** 5/30/2017 7:00:00 PM  
**Show Time As:** Free  
**Importance:** High

**Personal Matters / Ex. 6** so deleting the room (as it would have been a trek for you anyway.)



## Appointment

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**From:** Kupchan, Simma [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=784E0AEA94A7485FA0435CC0CF5A62A5-SASHER]  
**Sent:** 5/25/2017 3:48:45 PM  
**To:** Thomas, Elizabeth [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=9e34a0e6f34345968aa130c4eb8438e2-ETHoma03]; Evalenko, Sandy [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=dd595e1baa9640a296313941e77ebdf0-SEvalenk]; Kwok, Rose [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=d3d2987ba8f246a5a9e37773201fd180-Kwok, Rose]  
**CC:** Owens, Nicole [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=30cf6e677ee74b2f998423e6e2836fdd-NOWens]; Wendelowski, Karyn [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=1d913e7d7397466a803149761a0bdf18-KWENDELO]; Eisenberg, Mindy [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=cfb4c26bb6f44c7db69f9884628b3ef9-Eisenberg, Mindy]; Nurse, Leanne [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=826243fb40f64a3ba99b0f98498ea4fe-Nurse, Leanne]; Nelson, Tomeka [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=31c257115c0c400dbb712c19b5ee82fb-TNelson02]  
**Subject:** Fed Reg Prep for WOTUS  
**Attachments:** FRL-9962-34-OW Elizabeth Thomas.docx; 2014 40 CFR 122.docx  
**Location:** Call in **Nonresponsive Conference Code/ Ex. 6**  
**Start:** 5/30/2017 6:30:00 PM  
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**Show Time As:** Tentative

Nonresponsive Discussion of Personal Matters / Ex. 6

so deleting the room (as it would have been a trek for you anyway.)

Appointment

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**From:** Kupchan, Simma [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=784E0AEA94A7485FA0435CC0CF5A62A5-SASHER]  
**Sent:** 5/24/2017 8:26:26 PM  
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**CC:** Owens, Nicole [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=30cf6e677ee74b2f998423e6e2836fdd-NOwens]; Wendelowski, Karyn [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=1d913e7d7397466a803149761a0bdf18-KWENDELO]; Eisenberg, Mindy [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=cfb4c26bb6f44c7db69f9884628b3ef9-Eisenberg, Mindy]; Nurse, Leanne [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=826243fb40f64a3ba99b0f98498ea4fe-Nurse, Leanne]; Nelson, Tomeka [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=31c257115c0c400dbb712c19b5ee82fb-TNelson02]  
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**End:** 5/25/2017 6:00:00 PM  
**Show Time As:** Tentative

Nonresponsive Discussion of Personal Matters / Ex. 6

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Appointment

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**From:** Kupchan, Simma [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=784E0AEA94A7485FA0435CC0CF5A62A5-SASHER]  
**Sent:** 5/22/2017 6:28:09 PM  
**To:** Thomas, Elizabeth [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=9e34a0e6f34345968aa130c4eb8438e2-ETHoma03]; Evalenko, Sandy [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=dd595e1baa9640a296313941e77ebdf0-SEvalenk]; Kwok, Rose [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=d3d2987ba8f246a5a9e37773201fd180-Kwok, Rose]  
**CC:** Owens, Nicole [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=30cf6e677ee74b2f998423e6e2836fdd-NOWens]; Wendelowski, Karyn [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=1d913e7d7397466a803149761a0bdf18-KWENDELO]; Eisenberg, Mindy [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=cfb4c26bb6f44c7db69f9884628b3ef9-Eisenberg, Mindy]; Nurse, Leanne [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=826243fb40f64a3ba99b0f98498ea4fe-Nurse, Leanne]; Nelson, Tomeka [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=31c257115c0c400dbb712c19b5ee82fb-TNelson02]  
**Subject:** Fed Reg Prep for WOTUS  
**Attachments:** FRL-9962-34-OW Elizabeth Thomas.docx; 2014 40 CFR 122.docx  
**Location:** DCRoomARN7346/DC-Ariel-Rios-OGC; Call in  
**Start:** 5/25/2017 5:30:00 PM  
**End:** 5/25/2017 6:00:00 PM  
**Show Time As:** Tentative

**Nonresponsive Conference Code/ Ex. 6**

Adding call in number and the 2014 version of a CFR definition, for reference. Thanks.

# 2014 40 CFR 122.2

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- **LEXISNEXIS' CODE OF FEDERAL REGULATIONS**
- **TITLE 40 -- PROTECTION OF ENVIRONMENT**
- **CHAPTER I -- ENVIRONMENTAL PROTECTION AGENCY**
- **SUBCHAPTER D -- WATER PROGRAMS**
- **PART 122 -- EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM**
- **SUBPART A -- DEFINITIONS AND GENERAL PROGRAM REQUIREMENTS**

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- The following definitions apply to parts 122, 123, and 124. Terms not defined in this section have the meaning given by CWA. When a defined term appears in a definition, the defined term is sometimes placed in quotation marks as an aid to readers.

\* \* \* \* \*

Waters of the United States or waters of the U.S. means:

- (a) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- (b) All interstate waters, including interstate "wetlands;"
- (c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, "wetlands," sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:
  - (1) Which are or could be used by interstate or foreign travelers for recreational or other purposes;
  - (2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
  - (3) Which are used or could be used for industrial purposes by industries in interstate commerce;
- (d) All impoundments of waters otherwise defined as waters of the United States under this definition;
- (e) Tributaries of waters identified in paragraphs (a) through (d) of this definition;
- (f) The territorial sea; and
- (g) "Wetlands" adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) through (f) of this definition.

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Wetlands means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

Whole effluent toxicity means the aggregate toxic effect of an effluent measured directly by a toxicity test.

NOTE: At 45 FR 48620, July 21, 1980, the Environmental Protection Agency suspended until further notice in § 122.2, the last sentence, beginning "This exclusion applies . . ." in the definition of "Waters of the United States." This revision continues that suspension. n1

n1 EDITORIAL NOTE: The words "This revision" refer to the document published at 48 FR 14153, Apr. 1, 1983.

40 CFR 122.2

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40 CFR 122.2

# 2014 40 CFR 122.2

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40 CFR 122.2

Appointment

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**From:** Kupchan, Simma [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=784E0AEA94A7485FA0435CC0CF5A62A5-SASHER]  
**Sent:** 5/22/2017 5:44:43 PM  
**To:** Thomas, Elizabeth [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=9e34a0e6f34345968aa130c4eb8438e2-ETHoma03]; Evalenko, Sandy [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=dd595e1baa9640a296313941e77ebdf0-SEvalenk]; Kwok, Rose [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=d3d2987ba8f246a5a9e37773201fd180-Kwok, Rose]  
**CC:** Owens, Nicole [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=30cf6e677ee74b2f998423e6e2836fdd-NOwens]; Wendelowski, Karyn [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=1d913e7d7397466a803149761a0bdf18-KWENDELO]; Eisenberg, Mindy [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=cfb4c26bb6f44c7db69f9884628b3ef9-Eisenberg, Mindy]; Nurse, Leanne [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=826243fb40f64a3ba99b0f98498ea4fe-Nurse, Leanne]; Nelson, Tomeka [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=31c257115c0c400dbb712c19b5ee82fb-TNelson02]  
**Subject:** Fed Reg Prep for WOTUS  
**Attachments:** FRL-9962-34-OW Elizabeth Thomas.docx; 2014 40 CFR 122.docx  
**Location:** DCRoomARN7346/DC-Ariel-Rios-OGC; Call in Nonresponsive Conference Code/ Ex. 6  
**Start:** 5/22/2017 6:00:00 PM  
**End:** 5/22/2017 7:00:00 PM  
**Show Time As:** Tentative

Adding call in number and the 2014 version of a CFR definition, for reference. Thanks.

**From:** Kupchan, Simma  
**Location:** DCRoomARN7346/DC-Ariel-Rios-OGC  
**Importance:** Normal  
**Subject:** Fed Reg Prep for WOTUS  
**Start Time:** Mon 5/22/2017 6:00:00 PM  
**End Time:** Mon 5/22/2017 7:00:00 PM  
**Required Attendees:** Thomas, Elizabeth; Evalenko, Sandy; Kwok, Rose  
**Optional Attendees:** Owens, Nicole; Wendelowski, Karyn; Eisenberg, Mindy  
[FRL-9962-34-OW Elizabeth Thomas.docx](#)

**To:** Christensen, Damaris[Christensen.Damaris@epa.gov]; Wendelowski, Karyn[wendelowski.karyn@epa.gov]  
**From:** Kwok, Rose  
**Sent:** Fri 4/14/2017 3:54:05 PM  
**Subject:** FW: biology of int/ephemeral streams

FYI

---

**From:** Nadeau, Tracie  
**Sent:** Friday, April 14, 2017 11:53 AM  
**Subject:** FW: biology of int/ephemeral streams

For your reading pleasure. WOTUS rule mentioned near the end, as is out-of-kind stream mitigation, lots of bugs.

<https://www.hakaimagazine.com/article-long/embracing-weirdness-waterless-waterways>

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**Tracie-Lynn Nadeau, PhD** | Environmental Scientist | office: 503.326.3685 | [nadeau.tracie@epa.gov](mailto:nadeau.tracie@epa.gov) |  
**U.S. Environmental Protection Agency** | Region 10 | mobile: Personal Phone / Ex. 6  
805 SW Broadway, Suite 500, Portland OR 97205 | fax: 503.326.3399 |

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40 CFR 122.2

**To:** Wendelowski, Karyn[wendelowski.karyn@epa.gov]  
**From:** Kwok, Rose  
**Sent:** Tue 3/28/2017 1:44:27 PM  
**Subject:** Fwd: Advanced Notification Manuscript--#ORD020908 Leibowitz, Connectivity of streams and wetlands to downstream waters - comments requested by April 11  
[Leibowitz-CONNAP17-Manuscript Final.docx](#)  
[ATT00001.htm](#)  
[Leibowitz-CONNAP17-High Profile Fact Sheet.docx](#)  
[ATT00002.htm](#)

FYI, Haven't had a chance to look at this yet, but will do so... I think that this is the one that you didn't have a chance to review earlier

Sent from my iPhone

Begin forwarded message:

**From:** "Goodin, John" <[Goodin.John@epa.gov](mailto:Goodin.John@epa.gov)>  
**To:** "Eisenberg, Mindy" <[Eisenberg.Mindy@epa.gov](mailto:Eisenberg.Mindy@epa.gov)>, "Downing, Donna" <[Downing.Donna@epa.gov](mailto:Downing.Donna@epa.gov)>, "Kwok, Rose" <[Kwok.Rose@epa.gov](mailto:Kwok.Rose@epa.gov)>  
**Cc:** "Best-Wong, Benita" <[Best-Wong.Benita@epa.gov](mailto:Best-Wong.Benita@epa.gov)>  
**Subject:** FW: Advanced Notification Manuscript--#ORD020908 Leibowitz, Connectivity of streams and wetlands to downstream waters - comments requested by April 11

Trust Rose remains the right person to give this a quick read and advise on any relevant policy text/ implications or other comments of note.

Thanks

John

**From:** vanDrunick, Suzanne  
**Sent:** Monday, March 27, 2017 8:21 PM  
**To:** Best-Wong, Benita <[Best-Wong.Benita@epa.gov](mailto:Best-Wong.Benita@epa.gov)>; Goodin, John <[Goodin.John@epa.gov](mailto:Goodin.John@epa.gov)>  
**Subject:** Fwd: Advanced Notification Manuscript--#ORD020908 Leibowitz, Connectivity of streams and wetlands to downstream waters - comments requested by April 11

Dear Benita and John,

This will make its way to you, but I wanted to thank you in advance for comments.



Suzanne

Begin forwarded message:

**From:** "vanDrunick, Suzanne" <[vanDrunick.Suzanne@epa.gov](mailto:vanDrunick.Suzanne@epa.gov)>  
**To:** "Reiley, Mary" <[Reiley.Mary@epa.gov](mailto:Reiley.Mary@epa.gov)>, "Ohanian, Edward" <[Ohanian.Edward@epa.gov](mailto:Ohanian.Edward@epa.gov)>  
**Cc:** "Matney, Rachel" <[Matney.Rachel@epa.gov](mailto:Matney.Rachel@epa.gov)>, "Williams, Joe" <[Williams.Joe@epa.gov](mailto:Williams.Joe@epa.gov)>  
**Subject:** **Advanced Notification Manuscript--#ORD020908 Leibowitz, Connectivity of streams and wetlands to downstream waters - comments requested by April 11**

Dear Mary and Ed

Please see below and attached. Comments would be appreciated by April 11.

Thank you

Suzanne

**Deliberative Process / Ex. 5**

**Deliberative Process / Ex. 5**

**Deliberative Process / Ex. 5**

**Deliberative Process / Ex. 5**

**Deliberative Process / Ex. 5**

**To:** Christensen, Damaris[Christensen.Damaris@epa.gov]  
**Cc:** Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]; Wendelowski, Karyn[wendelowski.karyn@epa.gov]  
**From:** Kwok, Rose  
**Sent:** Sat 3/25/2017 3:17:41 PM  
**Subject:** Re: WOTUS follow up

I didn't { **Deliberative Process / Ex. 5**

**Deliberative Process / Ex. 5**

Sent from my iPhone

> On Mar 25, 2017, at 8:04 AM, Kwok, Rose <Kwok.Rose@epa.gov> wrote:

>

> I did the **Deliberative Process / Ex. 5** I'll forward if it's still in  
the emails in my phone

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> Sent from my iPhone

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>> On Mar 24, 2017, at 9:14 PM, Christensen, Damaris <Christensen.Damaris@epa.gov> wrote:

>>

**Deliberative Process / Ex. 5**

# **Deliberative Process / Ex. 5**

# Deliberative Process / Ex. 5

>>

>> -----Original Message-----

>> From: Eisenberg, Mindy

>> Sent: Friday, March 24, 2017 8:39 PM

>> To: Wendelowski, Karyn <wendelowski.karyn@epa.gov>

>> Cc: Christensen, Damaris <Christensen.Damaris@epa.gov>

>> Subject: Re: WOTUS follow up

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>> Thanks Karyn! We'll take care of the hard copies but doing a

Deliberative Process / Ex. 5

>> Mindy

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>> Sent from my iPhone

>>

>>> On Mar 24, 2017, at 6:06 PM, Wendelowski, Karyn <wendelowski.karyn@epa.gov> wrote:

>>>

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Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

I'll cc you on whatever I send.

>>>

>>> Karyn Wendelowski

>>> Attorney Advisor

>>> Office of General Counsel

>>> (202) 564-5493

>>>

>>>> On Mar 24, 2017, at 3:45 PM, Eisenberg, Mindy <Eisenberg.Mindy@epa.gov> wrote:

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>>>> Sigh. Not sure if Rose had time. By chance have you had to time

Deliberative Process / Ex. 5

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>>>> Mindy Eisenberg

>>>> Acting Director, Wetlands Division

>>>> Office of Wetlands, Oceans and Watersheds U.S. Environmental

>>>> Protection Agency

>>>> 1200 Pennsylvania Ave., NW, mailcode 4502T Washington, DC 20460

>>>> (202) 566-1290

>>>> eisenberg.mindy@epa.gov

>>>>

>>>> -----Original Message-----

>>>> From: Campbell, Ann

>>>> Sent: Friday, March 24, 2017 3:36 PM

>>>> To: Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Christensen, Damaris

>>>> <Christensen.Damaris@epa.gov>; Kwok, Rose <Kwok.Rose@epa.gov>;

>>>> Downing, Donna <Downing.Donna@epa.gov>

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**Deliberative Process / Ex. 5**

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>>>> Thanks!

>>>> Ann

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**Cc:** Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]; Wendelowski, Karyn[wendelowski.karyn@epa.gov]  
**From:** Kwok, Rose  
**Sent:** Sat 3/25/2017 3:04:01 PM  
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>>> <Christensen.Damaris@epa.gov>; Kwok, Rose <Kwok.Rose@epa.gov>;

>>> Downing, Donna <Downing.Donna@epa.gov>

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Deliberative Process / Ex. 5 Where are we with that?

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>>> Thanks!

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**To:** Wendelowski, Karyn[wendelowski.karyn@epa.gov]; Wehling, Carrie[Wehling.Carrie@epa.gov]  
**From:** Christensen, Damaris  
**Sent:** Tue 2/7/2017 10:40:23 PM  
**Subject:** Can you review factsheet for confirmation hearing?  
[Confirmation Hearing Factsheet CWR- 02-07-17.docx](#)

We are supposed to send to OW by 10 am tomorrow, sorry for the short turnaround time, I just got final comments.

Damaris

Message

**From:** Wendelowski, Karyn [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=1D913E7D7397466A803149761A0BDF18-KWENDELO]  
**Sent:** 5/10/2017 2:37:02 PM  
**To:** Kwok, Rose [Kwok.Rose@epa.gov]  
**Subject:** Fw: 6th Cir amicus briefs pt 2  
**Attachments:** ENV\_DEFENSE-#793670-v1-WOTUS\_-\_amicus\_brief\_of\_Trout\_Unlimited\_et\_al\_(Sportsmen).PDF; ENV\_DEFENSE-#793671-v1-WOTUS\_-\_amicus\_brief\_of\_members\_of\_congress\_(for\_rule).PDF

---

**From:** Mann, Martha (ENRD) <Martha.Mann@usdoj.gov>

**Sent:** Friday, January 20, 2017 4:06 PM

**To:** Kupchan, Simma; Neugeboren, Steven; Wehling, Carrie; Wendelowski, Karyn; 'milt.boyd@usace.army.mil'; 'Inkelas, Daniel HQ02'; Gunter, David (ENRD); Lundman, Robert (ENRD); Mergen, Andy (ENRD); Dertke, Daniel (ENRD); Dona, Amy (ENRD); O'Donnell, Jessica (ENRD); Samuels, Stephen (ENRD); Lipshultz, Jon (ENRD); 'David.R.Cooper@usace.army.mil'; McCune, Devon Lehman (ENRD); 'Timbrook, Shahara T (Tennaile) MAJ USARMY USAR LEGAL CMD (US)'; 'Roy, Catherine B (Katie) CPT USARMY HQDA OGC (US)'; Neumann, Jennifer Scheller (ENRD); McArdle, Kevin (ENRD); Doyle, Andrew (ENRD)

**Subject:** RE: WOTUS - additional amicus briefs

Here are two more amicus briefs filed today – one filed by Trout Unlimited and other sportsmen's groups, and one by 45 current and former members of Congress (if I counted the list at the end of the brief correctly).

I won't be near my computer for a while, but will forward any additional briefs over the weekend or on Monday morning.

Have a good weekend,  
Martha

---

**From:** Mann, Martha (ENRD)

**Sent:** Friday, January 20, 2017 8:55 AM

**To:** 'Kupchan, Simma' <Kupchan.Simma@epa.gov>; 'Neugeboren, Steven' <Neugeboren.Steven@epa.gov>; 'Wehling, Carrie' <Wehling.Carrie@epa.gov>; 'Wendelowski, Karyn' <wendelowski.karyn@epa.gov>; milt.boyd@usace.army.mil; 'Inkelas, Daniel HQ02' <Daniel.Inkelas@hq02.usace.army.mil>; Gunter, David (ENRD) <DGunter@ENRD.USDOJ.GOV>; Lundman, Robert (ENRD) <RLUNDMAN@enrd.usdoj.gov>; Mergen, Andy (ENRD) <AMergen@ENRD.USDOJ.GOV>; Dertke, Daniel (ENRD) <DDERTKE@enrd.usdoj.gov>; Dona, Amy (ENRD) <ADona@ENRD.USDOJ.GOV>; O'Donnell, Jessica (ENRD) <JO'Donnell@ENRD.USDOJ.GOV>; Samuels, Stephen (ENRD) <SSamuels@ENRD.USDOJ.GOV>; Lipshultz, Jon (ENRD) <JLipshultz@ENRD.USDOJ.GOV>; 'David.R.Cooper@usace.army.mil' <David.R.Cooper@usace.army.mil>; McCune, Devon Lehman (ENRD) <DMcCune@ENRD.USDOJ.GOV>; Timbrook, Shahara T (Tennaile) MAJ USARMY USAR LEGAL CMD (US) <shahara.t.timbrook.mil@mail.mil>; 'Roy, Catherine B (Katie) CPT USARMY HQDA OGC (US)' <catherine.b.roy.mil@mail.mil>; Neumann, Jennifer Scheller (ENRD) <JNeumann@ENRD.USDOJ.GOV>; McArdle, Kevin (ENRD) <KMcArdle@ENRD.USDOJ.GOV>; Doyle, Andrew (ENRD) <ADoyle@ENRD.USDOJ.GOV>

**Subject:** WOTUS - latest activity

All,

Yesterday, the Tenth Circuit issued an order holding in abeyance the appeals from the Northern District of Oklahoma District Court, pending a decision by the Supreme Court on jurisdiction. See attached.

And four amicus briefs were filed in support of the Rule by groups of water and wetland scientists, small business owners, elected officials, and admin and enviro law professors. All of these are attached.

Today is the deadline for amicus briefs to be filed; I will check in later and send along any additional briefs that may be filed.

Thanks,  
Martha

Martha C. Mann  
United States Department of Justice  
Environment and Natural Resources Division  
202.514.2664

Mailing Address:  
P.O. Box 7611  
Washington, DC 20044-7611

Delivery Address:  
601 D Street NW, Suite 8000  
Washington, DC 20004

Message

**From:** Wendelowski, Karyn [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=1D913E7D7397466A803149761A0BDF18-KWENDELO]  
**Sent:** 5/10/2017 2:36:29 PM  
**To:** Kwok, Rose [Kwok.Rose@epa.gov]  
**Subject:** Fw: 6th Cir amicus briefs - pt 1  
**Attachments:** ENV\_DEFENSE-#793607-v1-DN\_57\_ORDER\_from\_Circuit\_Court\_abating\_cases\_pending\_the\_issuance\_of\_the\_United\_States\_Supreme\_Court\_s\_decision\_299\_.PDF; ENV\_DEFENSE-#793668-v1-WOTUS\_-\_amicu\_brief\_of\_elected\_officials.PDF; ENV\_DEFENSE-#793667-v1-WOTUS\_-\_amicus\_brief\_of\_small\_business\_owners.PDF; ENV\_DEFENSE-#793666-v1-WOTUS\_-\_amicus\_brief\_of\_admin\_and\_enviro\_law\_professors.PDF; ENV\_DEFENSE-#793665-v1-WOTUS\_-\_amicus\_brief\_of\_wetland\_and\_water\_scientists.PDF

---

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**Sent:** Friday, January 20, 2017 8:55 AM  
**To:** Kupchan, Simma; Neugeboren, Steven; Wehling, Carrie; Wendelowski, Karyn; milt.boyd@usace.army.mil; 'Inkelas, Daniel HQ02'; Gunter, David (ENRD); Lundman, Robert (ENRD); Mergen, Andy (ENRD); Dertke, Daniel (ENRD); Dona, Amy (ENRD); O'Donnell, Jessica (ENRD); Samuels, Stephen (ENRD); Lipshultz, Jon (ENRD); 'David.R.Cooper@usace.army.mil'; McCune, Devon Lehman (ENRD); Timbrook, Shahara T (Tennaile) MAJ USARMY USAR LEGAL CMD (US); 'Roy, Catherine B (Katie) CPT USARMY HQDA OGC (US)'; Neumann, Jennifer Scheller (ENRD); McArdle, Kevin (ENRD); Doyle, Andrew (ENRD)  
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202.514.2664

Mailing Address:  
P.O. Box 7611  
Washington, DC 20044-7611

Delivery Address:  
601 D Street NW, Suite 8000

Washington, DC 20004

## CLEAN WATER RULE

### Issue:

- The Clean Water Rule, finalized by EPA and the U.S. Army Corps of Engineers on June 29, 2015, replaced longstanding regulations defining the scope of “waters of the United States” protected by all Clean Water Act (CWA) programs, responding to U.S. Supreme Court decisions and requests for rulemaking from many different stakeholders.
- As a result of a court-ordered nationwide stay, the agencies are currently using the previous regulatory definition of “waters of the United States.”
- The Clean Water Rule has received significant press coverage and Congressional interest.

### Talking Points:

- EPA and the U.S. Army Corps of Engineers finalized the Clean Water Rule to clarify those waters covered by the federal Clean Water Act.
- The Court of Appeals for the Sixth Circuit issued a nationwide stay on October 9, 2015. Accordingly, EPA and the U.S. Army Corps of Engineers will continue to implement regulations defining Clean Water Act jurisdiction as they did prior to the Rule’s effective date.
- The U.S. Supreme Court granted *certiori* in early 2017 to decide which court has jurisdiction over the merits of the case.

### Background:

- The definition of “waters of the United States” applies to all Clean Water Act programs.
- The Supreme Court’s decisions in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (SWANCC) (2001) and *Rapanos v. United States* (2006) created considerable confusion regarding the scope of CWA jurisdiction, and a very wide range of stakeholders called for rulemaking to increase clarity.
- Despite the confusion, the legislative history and Supreme Court decisions clearly extend CWA jurisdiction beyond navigable-in-fact waters.
- The Clean Water Rule:
  - Identifies categories of waters that are “waters of the United States,”
  - Identifies categories of waters that are excluded from jurisdiction, and
  - Provides several definitions, including for the first time a definition of “tributary.”
- The rule was finalized after consideration of over 1 million public comments on the proposed rule, and over 400 meetings with interested stakeholder groups.
- More than 1,200 peer-reviewed, published scientific studies support the rule’s conclusion that tributaries, adjacent waters, and impoundments as defined have a significant nexus to traditional navigable waters, interstate waters, and the territorial seas, and that other waters may be shown to have such a nexus.
- The rule is being litigated by the regulated community, states, and environmental groups as both too comprehensive and too lenient.
- The Science Advisory Board commented on both the Science Report and the proposed rule, concluding that much of the proposed rule was supported by available science and that the agencies could have protected yet more waters.

**To:** Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]  
**From:** Wendelowski, Karyn  
**Sent:** Mon 3/27/2017 2:01:00 PM  
**Subject:** Re: WOTUS follow up

I think in the interests of thoroughness it would be useful to her to have **Deliberative Process / Ex. 5**  
**Deliberative Process / Ex. 5**

Karyn Wendelowski  
Attorney Advisor  
Office of General Counsel  
(202) 564-5493

> On Mar 27, 2017, at 8:37 AM, Eisenberg, Mindy <Eisenberg.Mindy@epa.gov> wrote:

>

**Deliberative Process / Ex. 5**

>

> Sent from my iPhone

>

>> On Mar 27, 2017, at 8:16 AM, Wendelowski, Karyn <wendelowski.karyn@epa.gov> wrote:

>>

>> **Deliberative Process / Ex. 5**

>>

>> Karyn Wendelowski

>> Attorney Advisor

>> Office of General Counsel

>> (202) 564-5493

>>

>>> On Mar 27, 2017, at 8:02 AM, Eisenberg, Mindy <Eisenberg.Mindy@epa.gov> wrote:

>>>

>>> Thanks Karyn. I sent electronic copies forward on Friday and will have our SEE drop off hard copies this morning.

>>>

>>> Sent from my iPhone

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>>>> On Mar 27, 2017, at 8:00 AM, Wendelowski, Karyn <wendelowski.karyn@epa.gov> wrote:

>>>>

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**Deliberative Process / Ex. 5**

>>>>

>>>> Mindy would you like me to send electronic copies of everything to Sarah? **Deliberative Process / Ex. 5**

**Deliberative Process / Ex. 5**

? Or I can send you an email with the attachments for you to send to her?

>>>>

>>>> Karyn Wendelowski

>>>> Attorney Advisor

>>>> Office of General Counsel

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**From:** Wendelowski, Karyn  
**Sent:** Mon 3/27/2017 12:16:32 PM  
**Subject:** Re: WOTUS follow up

**Deliberative Process / Ex. 5**

Karyn Wendelowski  
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**To:** Kwok, Rose[Kwok.Rose@epa.gov]  
**From:** Wendelowski, Karyn  
**Sent:** Wed 3/1/2017 4:26:16 PM  
**Subject:** Fw: The final version for signature {Rose this old - not today's version)  
CWR FR notice.SignatureVersion.docx

# Deliberative Process / Ex. 5

Thanks!

---

**From:** Owens, Nicole  
**Sent:** Tuesday, February 28, 2017 2:09 PM  
**To:** Minoli, Kevin; Neugeboren, Steven; Wehling, Carrie; Wendelowski, Karyn; Siciliano, CarolAnn; Simons, Andrew; Shapiro, Mike; Campbell, Ann; Rees, Sarah  
**Cc:** Grantham, Nancy; Konkus, John; Hull, George; Jackson, Ryan; Brown, Byron; Schnare, David; Dravis, Samantha  
**Subject:** FW: The final version for signature

Hi.

# Deliberative Process / Ex. 5

Nicole

**From:** Minoli, Kevin  
**Sent:** Tuesday, February 28, 2017 1:10 PM  
**To:** Neugeboren, Steven <Neugeboren.Steven@epa.gov>; Wehling, Carrie <Wehling.Carrie@epa.gov>; Wendelowski, Karyn <wendelowski.karyn@epa.gov>; Siciliano, CarolAnn <Siciliano.CarolAnn@epa.gov>; Simons, Andrew <Simons.Andrew@epa.gov>; Packard, Elise <Packard.Elise@epa.gov>; Prabhu, Aditi <Prabhu.Aditi@epa.gov>; Shapiro, Mike <Shapiro.Mike@epa.gov>; Campbell, Ann <Campbell.Ann@epa.gov>; Rees, Sarah <rees.sarah@epa.gov>  
**Cc:** Grantham, Nancy <Grantham.Nancy@epa.gov>; Konkus, John <konkus.john@epa.gov>; Hull, George <Hull.George@epa.gov>; Jackson, Ryan <jackson.ryan@epa.gov>; Brown, Byron



<brown.byron@epa.gov>; Schnare, David <schnare.david@epa.gov>; Dravis, Samantha <dravis.samantha@epa.gov>

**Subject:** The final version for signature

Hi Everyone. This is the final version.

**Deliberative Process / Ex. 5**

# Deliberative Process / Ex. 5

Thanks, Kevin

**Kevin S. Minoli**

**Acting General Counsel**

**Office of General Counsel**

**US Environmental Protection Agency**

**Main Office Line: 202-564-8040**

**From:** Minoli, Kevin

**Sent:** Tuesday, February 28, 2017 12:45 PM

**To:** Neugeboren, Steven <Neugeboren.Steven@epa.gov>; Carrie Wehling <Wehling.Carrie@epa.gov>; Wendelowski, Karyn <wendelowski.karyn@epa.gov>; Siciliano, CarolAnn <Siciliano.CarolAnn@epa.gov>; Simons, Andrew <Simons.Andrew@epa.gov>; Packard, Elise <Packard.Elise@epa.gov>; Prabhu, Aditi (Prabhu.Aditi@epa.gov) <Prabhu.Aditi@epa.gov>; Shapiro, Mike <Shapiro.Mike@epa.gov>; Campbell, Ann <Campbell.Ann@epa.gov>; Rees, Sarah <rees.sarah@epa.gov>

**Cc:** Grantham, Nancy <Grantham.Nancy@epa.gov>; Konkus, John <konkus.john@epa.gov>; Hull, George <Hull.George@epa.gov>

**Subject:** Essentially final version of the FR Notice

All- Attached is the version that we will move into the signature process:

**Deliberative Process / Ex. 5**

**Deliberative Process / Ex. 5** Kevin

**Kevin S. Minoli**

**Acting General Counsel**

**Office of General Counsel**

**US Environmental Protection Agency**

**Main Office Line: 202-564-8040**